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International Legal Assistance Consortium  
Discussion Paper:

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# Resolving the Property Issue in Syria

Technically Possible,  
Politically Challenging and  
Central to Accountability



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## Technically Possible, Politically Challenging and Central to Accountability

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## Acronyms and List of Abbreviations

<b>COI</b>	Commission of Inquiry
<b>CSOS</b>	Civil society organisations
<b>ECHR</b>	European Convention on Human Rights
<b>HLP</b>	Housing, land and property
<b>ICTJ</b>	International Center for Transitional Justice
<b>IDPS</b>	Internally displaced persons
<b>IIMM</b>	International, Impartial and Independent Mechanism
<b>UN</b>	United Nations

## 1. Introduction

**By all appearances, contemporary Syria has become one of the places where the post-World War II rules-based order has gone to die. The United Nations (UN) has stood by in enforced idleness as the fighting raged, its mandate to combat threats to international peace and security set aside by divisions in the UN Security Council. Meanwhile, the core international rules and standards – human rights, rule of law, international humanitarian and criminal law – that represent the normative foundation for the UN’s work have been flouted by all parties to the conflict with near complete impunity.**

The human toll of this breakdown in global governance has been enormous. The death toll in Syria is thought to exceed 500,000, of which more than 11,000 are known to have been tortured to death in government prisons.<sup>1</sup> Wartime conditions have led to the forced recruitment, detention, disappearance and killing of tens of thousands of men and boys. They have also dramatically worsened the situation of Syrian women, who already faced systematic legal and social discrimination before 2011 and are now frequently left trying hold together displaced families without legal rights to household economic assets.

The Syrian economy is already at the verge of collapse, with core public services such as education and healthcare barely functioning and recent sanctions by the United States of America raising the prospect of food insecurity and even starvation.<sup>2</sup> The arrival of COVID 19 has dampened fighting but seen the introduction of draconian restrictions on freedom of movement.<sup>3</sup>

Meanwhile about half the population is displaced, including over 6 million internally displaced persons (IDPs) in Syria and similar number of refugees outside the country.<sup>4</sup> The Syrian Government has adopted a series of laws and decrees that threaten the property rights of large part of the population, particularly those who are displaced, and concerns are rising that these will prevent meaningful return and create new displacement, leading to a protracted regional crisis.

To date, all efforts to develop international accountability mechanisms have stalled. While veto threats have prevented the UN Security Council from

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<sup>1</sup> Megan Specia, “How Syria’s Death Toll is Lost in the Fog of War”, *The New York Times* (13 April 2018).

<sup>2</sup> Maha El-Dahan, Ellen Francis, “Severe bread shortages loom for Syria as fresh U.S. sanctions grip”, Reuters (09 July 2020).

<sup>3</sup> Center for Operational Analysis and Research, “Mobility restrictions and financial peril mount as COVID-19 spreads”, *Syria Update: 06 April 2020* (06 April 2020).

<sup>4</sup> Internal Displacement Monitoring Centre, “Country Overview: Syria” (accessed 15 January 2002).

referring the situation in Syria to the International Criminal Court<sup>5</sup>, the International, Impartial and Independent Mechanism (IIIM) created by the UN General Assembly in 2016 can assist in prosecuting Syrian war crimes by actively compiling evidence. The body has no independent mandate to prosecute crimes.<sup>6</sup> The UN Independent International Commission of Inquiry for Syria (COI) has documented war crimes, crimes against humanity and even genocide in the course of the Syrian conflict, but there is no international mechanism to investigate and prosecute the responsible individuals.

In light of this paralysis of international justice, advocates have focused on national indictments and prosecutions, mainly in European countries, under the theory of universal jurisdiction.<sup>7</sup> There has been notable progress in pursuing accountability before European courts in individual cases.<sup>8</sup> However, this avenue will not be available to most victims, and perhaps serves primarily to remind the public and policymakers of the enormity of the crimes in Syria, underscoring the need to address them in an eventual peace process. Meanwhile, approaches based on universal jurisdiction are not without risks. First, they must not obscure the primary duty of the authorities in Syria to protect their population from harm and provide redress when they fail to do so. Second, it is crucial not to limit the concept of accountability for crimes in Syria to prosecution. In fact, accountability is a much broader principle that also includes legal remedies and reparations addressed to victims.

For individuals and communities affected by the conflict, forced displacement and the confiscation of property and homes stand out as crimes that may lead to the permanent victimization of those affected. The loss of homes and properties compromises displaced persons' security, privacy, and economic livelihoods. Property frequently represents the most important economic asset of whole families, and its loss perpetuates displacement, preventing those affected from fully exercising basic human and civil rights. In this sense, resolving the property issues of displaced persons may represent the most important part of the accountability puzzle in Syria.

Moreover, there are a range of strong incentives for resolving the property issue with the potential to unite a broad coalition of actors. Finding a solution for displacement and creating legal certainty around property rights is crucial for sustainable peace and development, not only in Syria but also in the

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<sup>5</sup> Maryam Saleh, "Syrian Refugees Use Precedent Set in Rohingya Case to Try to Bring Government Officials Before the International Criminal Court", *The Intercept* (16 March 2019).

<sup>6</sup> United Nations, "Head of International Mechanism on Syria Describes Progress Documenting Crimes Committed by Both Sides, as General Assembly Takes Up Report", *Press Release* (GA/12139, 23 April 2019).

<sup>7</sup> Borzou Daragahi, "'It gives us hope': European prosecutors piece together cases against Syrian regime war criminals", *The Independent* (16 November 2019).

<sup>8</sup> European Center for Constitutional and Human Rights, "With the First Criminal Trial Worldwide on Torture in Syria, German Courts to Set International Precedent" (29 October 2019); Civil Rights Defenders, "Syrians in Sweden are Demanding Redress for Torture" (20 February 2019).

broader region. Concerns about the protracted displacement of millions of Syrians have led to increasing pressure to address the “housing, land and property” (HLP) question in the context of peace talks and constitutional negotiations. Meanwhile, the deepening economic crisis in Syria has exposed the population at large to further threats to their economic assets and property rights.<sup>9</sup> Given that historically unclear and inequitable property rights hindered equal development in Syria, there are incentives for all sides to be interested in an equitable and sustainable outcome.

During the 1990s and 2000s, new responses to conflict-related HLP violations were crafted and disseminated. Successful practice in contexts like Bosnia, and international standards such as the development of UN Restitution Principles helped to drive a process by which HLP remedies became a standard element of peace agreements. Regional human rights courts, most notably the European Court of Human Rights, have also developed detailed jurisprudence setting out effective responses to conflict-related HLP violations. While the issues thrown up by the conflict in Syria are technically complicated and politically sensitive, they are in no sense new, unprecedented or unresolvable given political commitment.

Based on a series of seminars conducted by ILAC with its member organization, the CEELI Institute and the German Bar Association, as well as analyses by Syrian jurists, this brief sets out how international standards and practices can assist in remedying HLP issues in Syria. After introducing the relationship between HLP violations and accountability in more detail, this brief goes on to describe some of the HLP issues of most concern in Syria and propose options for how they could be addressed. The final section describes how property remedies would need to be framed to be effective and ensure equal access, including taking into account the particular legal necessities of women, in light of the structural and historical discrimination against them in Syria.

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<sup>9</sup> Center for Operational Analysis and Research, “Syria 2020 budget approved: more SYP, less USD”, *Syria Update: 27 November to 03 December 2019* (04 December 2019).

## 2. Accountability for HLP violations in Syria

**All parties to the conflict in Syria have displaced civilians and confiscated their property. As in many other conflicts, HLP violations have entrenched and perpetuated displacement on all sides. When the homes of those who have fled are not destroyed, they are typically handed out to others for temporary or permanent use. In some cases, this may be for humanitarian reasons, such as housing persons displaced from other parts of the country. In other cases, it may be based on patronage systems, with the most valuable properties doled out to fighters and other supporters of local warlords or political leaders. The effect is always the same, with those forced out left dispossessed of their property and prevented from returning to their homes.**

In Syria, many non-state armed actors have been credibly accused of HLP violations. Islamic State had an open policy of confiscating the property of those who opposed it to house its fighters and administrators, and Islamist forces controlling parts of northern Syria have similarly taken property to suit their own needs.<sup>10</sup> Kurdish forces in the north of the country have also been accused of displacing local non-Kurdish populations, while Turkey-backed opposition factions have more recently been criticized for confiscations and other crimes against civilian populations.

However, the Syrian Government is the *de jure* duty bearer in the country, bound under international law to refrain from violating the rights of persons on its territory and prevent foreseeable abuses by non-state actors. In addition, the Government has now retaken control of most of the territory of the country and exercises *de facto* control over the homes and property of the most displaced and non-displaced Syrians alike. Recent controversies over property legislation and decrees adopted by the Government during the conflict have highlighted the risk that laws could be – and reportedly, are being – abused to allow the state to manipulate property rights in violation of the Constitution and the country's international obligations.

While accountability for violations of international human rights and humanitarian law is most commonly linked with criminal prosecution of perpetrators, it involves a broader set of responsibilities. In advising states on the design of the UN 2030 Agenda, the UN Office of the High Commissioner for Human Rights defined accountability as the “relationship of Government

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<sup>10</sup> Syrians for Truth and Justice, *Syria: Over 100 Houses and Shops Seized by HTS in Rural Hama* (18 November 2019).



policymakers and other *duty bearers* to the *rights holders* affected by their decisions and actions.”<sup>11</sup> Thus, accountability combines a broad approach to addressing grievances (including both prosecution of perpetrators and remedies for victims) with preventive measures to keep them from arising in the first place.

Practitioners of transitional justice also promote accountability in this broader sense in countries that have experienced massive human rights abuses. The International Center for Transitional Justice (ICTJ) has been quick to recognize the need to respond to widespread violations such as displacement and dispossession in Syria. In this sense, remedies for such violations is seen as part of a path to reintegration into society for the victims, as well as a precondition for reforms to prevent recurrence of conflict and abuses:

*When we talk of justice we need to remember that it consists of more than making sure Assad is held to account. It also means making Syria a place safe to live and where all its citizens enjoy the respect and protection of the state. That is – it requires root and branch reform.*<sup>12</sup>

In 2005, the UN General Assembly adopted the “Van Boven-Bassiouni Principles”, a set of guidelines on how gross violations of international human rights and humanitarian law should be remedied.<sup>13</sup> These principles emphasized prevention where possible, as well as investigation and prosecutions, but placed a firm emphasis on substantive reparations to victims, including restitution (including return of wrongfully confiscated property) and compensation for “economically assessable damage” arising from violations.<sup>14</sup> In the spirit of these principles, accountability involves a great deal more than preventing impunity, and places a primary responsibility on states to make victims of violations whole again.

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<sup>11</sup> OHCHR and Center for Economic and Social Rights, *Who Will Be Accountable? Human Rights and the Post-2015 Development Agenda* (2013), ix.

<sup>12</sup> Paul Seils, “In Syria, Little Chance of Justice or Change Without Return of Displaced” (ICTJ, 19 April 2016).

<sup>13</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Van Boven-Bassiouni Principles”), UN General Assembly resolution 60/147 (16 December 2005).

<sup>14</sup> Id., paragraphs 19-20.

### 3. Historical patterns of HLP violations in Syria

**From the earliest days of the uprising and subsequent conflict in Syria, there were reports of property confiscations being used as part of a broader crackdown on opposition protesters. In its 2017 rule of law assessment report, ILAC noted that Counter-Terrorism Courts set up in 2012 routinely ordered the seizure of all moveable and immovable property of suspects, who were frequently convicted without due process and solely on the basis of confessions reportedly obtained under torture.<sup>15</sup> However, there was initially less understanding of how deeply HLP violations ran in Syria's history and the extent to which they were a factor in the conflict. In a recent report for The Day After, Syrian jurists describe long-running trends that fed grievances behind the 2011 uprising and contributed to the vulnerability of those now displaced and dispossessed.<sup>16</sup>**

The first involved the failure of successive constitutional guarantees (Article 15) of the right of property to result in meaningful protection from arbitrary government confiscations. Formally, the country enjoyed a well-established (if incomplete) registry system as well as guarantees that property could not be expropriated except for public purposes and with fair compensation. However, these protections were meaningless in practice “in the absence of institutions to uphold and protect the Constitution” – a situation exacerbated by the State of Emergency in force in the country from 1962 to 2011.<sup>17</sup> As a result, arbitrary taking of property could be used to facilitate corrupt transactions and persecute individuals or even entire groups, as in the case of Kurds denied rights to their land in northern Syria.<sup>18</sup>

A second set of grievances developed around the lack of effective social housing policies in Syria in the context of rapid population growth and urbanization. These trends resulted in the explosive growth of informal settlements that eventually came to comprise one-fifth of all housing units in Syria and up to forty percent of urban housing.<sup>19</sup> Virtually all were technically illegal, either being built on land zoned for other purposes or on the 47% of real estate parcels in the country that had not yet been fully delimited and registered by the

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<sup>15</sup> Mikael Ekman (ed.), *ILAC Rule of Law Assessment Report: Syria 2017* (2017), 66-7.

<sup>16</sup> Khaled El Helou, Riyad Ali and Mohamed Anwar Majanni, *The Property Issue and its Implications for Ownership Rights in Syria* (The Day After, June 2019).

<sup>17</sup> *Id.*, 30.

<sup>18</sup> *Id.*, 50.

<sup>19</sup> *Id.*, 14.

outbreak of the conflict.<sup>20</sup> After a series of failed efforts to control informal settlements, the government largely tolerated them, providing some services, and issuing laws (26/2000 and 33/2008) granting municipalities the possibility to rezone informal settlements and formalise their tenure. Few municipalities used this opportunity. Those that did, such as Homs (where 80% of informal settlements were regularized) found that the problem of informal settlements persisted as the supply of formal housing remained insufficient to address growing needs, while subsequently built informal settlements were deemed ineligible for regularization.<sup>21</sup>

Participants in ILAC and CEELI HLP seminars have spoken of how informal settlements frequently came to consist of large multistory apartment buildings developed by corrupt “construction mafias”, with residents paying premium prices in hopes of being able to regularize their ownership. Observers have noted that policies ostensibly intended to increase housing supply struggled against structural obstacles:

*The supply of housing in Syria was in great majority made by small individual private developers. The contribution of public and cooperative developers was historically less than 25% of the total; the so-called “cooperative” being a form of large private housing subsidized development. The Syrian authorities maintained for decades a policy of scarcity of urban construction licenses, especially around the year 2000, partly due to delays in the evolution of the urban plans, but also and mainly as real-estate was a source of rent-seeking and political control.*<sup>22</sup>

Although neo-liberal policies resulted in a surge of construction from 2005 onward, this mainly resulted in expensive, high-end apartments that did not address pent up demand for affordable housing.<sup>23</sup> Public and cooperative housing developers were seen as “neglecting their essential role of building economic housing for low-income people.”<sup>24</sup> In part as a result, many of the 2011 protests against the Government erupted in informal settlements. These were also the areas targeted for the most repressive retaliations, eventually including military blockades and indiscriminate bombardment. Where such neighborhoods were militarily reconquered or the population evacuated by means of a “reconciliation agreement”, the Government frequently demolished

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<sup>20</sup> Id., 11.

<sup>21</sup> UN HABITAT, *City Profile Homs: Multi-Sector Assessment* (May 2014), 10.

<sup>22</sup> Samir Aita, *Urban Recovery Framework for Post-Conflict Housing in Syria: A First Physical, Social and Economic Approach* (July 2019), 2.

<sup>23</sup> Id.

<sup>24</sup> Khaled El Helou, Riyad Ali and Mohamed Anwar Majanni, *The Property Issue and its Implications for Ownership Rights in Syria* (The Day After, June 2019), 16.

the remaining buildings.<sup>25</sup> However, despite growing awareness of these and other HLP abuses, the issue did not initially emerge as a priority and was not explicitly addressed in the UN-led Geneva peace process. However, in 2018, HLP issues in Syria unexpectedly burst into the spotlight with the passage of an obscure law ostensibly regulating urban redevelopment.

Law 10, passed in April 2018, did little more than give nationwide scope to a special scheme previously only applicable in Damascus. On its face, Law 10 simply allows informal settlements to be redeveloped by the well-established method of “land readjustment” – whereby original residents in rebuilt areas receive smaller parcels that have nevertheless increased in value due to the introduction of public infrastructure and services in the rest of the area.<sup>26</sup> However, there are a range of issues that render Law 10 suspect. Despite being applicable to informal settlements, Law 10 only allows residents with formally registered property rights to directly benefit, with those occupying illegal structures accorded only rent supplement payments for a limited time. Moreover, any residents without rights recorded in the land registry are given a year to present evidence of their rights in person. For displaced persons and refugees facing possible arrest and detention, this is an impossible condition.

Most revealingly, the Law 10 projects proposed so far have been located in former opposition areas, raising concerns that reconstruction is being proposed in a manner that would effectively erase displaced opponents of the government from their former homes:

*Many of those who protested against the government after March 2011 came from the suburbs of cities like Aleppo, Damascus, and Homs .... The regime's neoliberal policies in the past had impoverished large numbers of Syrians in those areas. Repression and corruption only added to their dissatisfaction. That is why the regime's reconstruction and rehabilitation programs have been designed to keep poorer, more antagonistic populations out of key areas of these cities and create lucrative real estate opportunities that the regime and its network of supportive business leaders could profit from.<sup>27</sup>*

Although Law 10 has focused attention on HLP issues in Syria, it has also underscored their complexity and the tremendous challenge of addressing them. As the conflict has wound down, Law 10 has been accompanied by a

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<sup>25</sup> Human Rights Watch, *Razed to the Ground: Syria's Unlawful Neighborhood Demolitions in 2012-2013* (2014).

<sup>26</sup> UN-HABITAT, *Handbook on Best Practices, Security of Tenure and Access to Land* (2003), 55.

<sup>27</sup> Joseph Daher, “The Paradox of Syria's Reconstruction” (Carnegie Middle East Center, 04 September 2019).

broad range of other measures that appear calculated to dispossess opponents of the government – and other categories of Syrians – and disperse their assets to its supporters. Beyond Law 10 itself, rubble removal and other regulatory pretexts have also been used to level war-damaged neighborhoods. Opposition-associated neighborhoods have also been targeted for selective enforcement of utilities bills that accrued during the conflict, putting further pressure on some of Syria's most marginalized communities.<sup>28</sup>

More systematic use of the Anti-Terror legislation to dispossess displaced opposition figures has also emerged as “one of the key policy levers to pursue urban ‘reform’ in Syria.”<sup>29</sup> Decree 63 of 2012, in particular, allows the Finance Ministry to target and freeze the assets of the entire families of people merely suspected of crimes under Syria's Counterterrorism Law.<sup>30</sup> There are rumors that such measures are being systematically taken in areas emptied by “reconciliation agreements” without any notice provided to the displaced owners. Most recently, avoiding the threat of forced conscription by the Syrian army has become a new ground for property confiscations, potentially affecting thousands more displaced families.<sup>31</sup>

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<sup>28</sup> Center for Operational Analysis and Research, “Basic service debt poses new HLP risks in southern Damascus”, *Syria Update: 27 November to 03 December 2019* (04 December 2019).

<sup>29</sup> Center for Operational Analysis and Research, “Eastern Ghouta Faces Renewed HLP Concerns from Antiterror Measures”, *Syria Update: 18 September to 24 September 2019* (25 September 2019).

<sup>30</sup> Human Rights Watch, “Syria: Suspects' Families Assets Seized - Collective Punishment of Relatives Under Overbroad Terrorism Law” (16 July 2019).

<sup>31</sup> Center for Operational Analysis and Research, “Military service law amended: Serve, pay up, or forfeit assets”, *Syria Update: 06 January 2020* (07 January 2020).

## 4. Addressing HLP Issues in Syria

**It is easy to despair at the difficulty of addressing the HLP issue in Syria. The combination of technical complexity and hard political constraints seems overwhelming, particularly as the onset of COVID-19 in the region exacerbates the hardship faced by those most affected by the conflict. However, this brief sets out to make two central points. First, the technical challenges are real, but will not on their own be outcome determinative. Existing comparative practice based on international law and standards provides technical tools that can be useful to address HLP in Syria. Some of the most relevant will be described below. However, the real sticking points is political. Rather than generalizing about political will, it may be more useful going forward to examine political incentives regarding HLP.**

Syria is a fractured environment with different levels of Government control across the regions of the country and a considerable de facto role in decision-making for foreign powers involved in the conflict. The multiplicity of actors and the shifting relationships between them complicate analysis of their motivations. However, it is increasingly clear that there is no monolithic view on HLP issues, nor uniform opposition to finding equitable ways forward. In fact, several recent developments underscore the extent to which the population at large in Syria faces common HLP threats and may share incentives with refugees and international actors outside Syria.

Part of this dynamic involves resentments between Syria's traditional business class and the elite surrounding the government that have enriched themselves through privileged access to assets seized by means such as Law 10.<sup>32</sup> A recent case highlighting these tensions is Qaboun, an industrial suburb of Damascus slated for Law 10 redevelopment where massive resistance by industrialists and residents led to the process being frozen by President Al-Assad.<sup>33</sup> Meanwhile, the Government's financial situation has become so pressed that it has begun to force even its closest backers to pay back some of their profits.<sup>34</sup> To repay military assistance from foreign allies, the Government has also engaged in dubious concessions of some of Syria's few remaining natural resource revenue streams.<sup>35</sup>

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<sup>32</sup> Joseph Daher, "Reconstructing Syria: How the al-Assad regime is capitalizing on destruction", *Reconstructing Syria: Risks and Side Effects* (Adopt a Revolution, December 2018), 11-12.

<sup>33</sup> Center for Operational Analysis and Research, "Freezing Qaboun Urban Plan, President Al-Assad To Decide Area's Fate", *Syria Update: 18 September to 24 September 2019* (25 September 2019).

<sup>34</sup> Center for Operational Analysis and Research, "Rami Makhlouf Among Syrian Businessmen Targeted in Rumored Crackdown", *Syria Update: August 29 to September 04 2019* (05 September 2019).

<sup>35</sup> Jihad Yazigi, "Reconstruction or Plunder? How Russia and Iran are Dividing Syrian Resources", *Reconstructing Syria: Risks and Side Effects* (Adopt a Revolution, December 2018).

In a Syria, in which virtually no one, displaced or not, enjoys equal and secure HLP rights, there is scope for a broad alignment of interests around the need to reverse the country's historical trends and promote secure and equitable property rights as a means for stabilizing the country. Returning to international practice, it is possible to draw key lessons from the most successful and well-studied case of post-conflict restitution to date, that of Bosnia in the aftermath of its 1992-1995 conflict, and others. Although it was crucial that restitution in Bosnia was anchored in the Dayton Peace Agreement and robustly supported by international peacebuilding actors, one of the lesser known elements in the successful return of 300,000 claimed homes was the formation of a coalition of interested actors following a shared policy. The "Property Law Implementation Plan" adopted in 2000 by key international monitors set out a vision for depoliticizing the process and supporting capacity among willing actors for a domestically driven process.<sup>36</sup> The resulting united front for property restitution helped to overcome bureaucratic resistance and empower displaced persons seeking reintegration in society.<sup>37</sup>

This example hints at the way that international standards can contribute to resolving HLP issues in Syria. Although many of the relevant human rights and humanitarian law rules are binding for Syria, their invocation alone is unlikely to promote meaningful change. To date, even overwhelming evidence of human rights abuses has been countered with blanket denial.<sup>38</sup> Instead, the norms and practices discussed in this brief are meant to give examples of how key technical HLP challenges in Syria might be addressed; they are chosen not because they are binding but because they are likely to be relevant. Examples drawn from the practice of the European Court of Human Rights are a good example. Syria is not bound by the European Convention on Human Rights (ECHR), but that is beside the point. The Court has an extensive jurisprudence involving post-conflict property issues in divided societies with norms, like those in Syria, originating in Ottoman law (e.g. Cyprus) as well as authoritarian socialism (e.g. the West Balkans). While Syria's unique contextual factors must be taken into account, these examples may inform viable ways forward.

It is also important to point out that information on best practices in HLP response is freely available. Most notably, the UN Restitution Principles adopted in 2005 provide a broad overview of best practices for implementing

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<sup>36</sup> Office of the High Representative, *Property Law Implementation Plan – Inter-Agency Framework Document* (2000), available at [http://www.ohr.int/?ohr\\_archive=plip-inter-agency-framework-document](http://www.ohr.int/?ohr_archive=plip-inter-agency-framework-document). For documentation of PLIP implementation see [http://www.ohr.int/?ohr\\_archive\\_taxonomy=property-law-implementation-plan&paged=1](http://www.ohr.int/?ohr_archive_taxonomy=property-law-implementation-plan&paged=1).

<sup>37</sup> Rhodri Williams, "Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice," *New York University Journal of International Law and Politics* 37/3 (March 2006).

<sup>38</sup> Guaranee le Caisne, "They were torturing to kill: inside Syria's death machine", *The Guardian* (01 October 2015).

HLP rights protected under international law.<sup>39</sup> A handbook on the more detailed implementation of these principles is also available.<sup>40</sup> The Council of Europe adopted its own set of principles on post-conflict restitution in 2010, based on a close analysis of the relevant caselaw by the European Court of Human Rights.<sup>41</sup> More recently, the UN Secretary General issued a Guidance Note on Land and Conflict that is primarily meant to guide UN activities but may be more generally useful in analyzing HLP crises such as that in Syria.<sup>42</sup> A wealth of other academic and practitioner studies also exist to shed light on the technical details of effective HLP responses.<sup>43</sup>

A closer analysis of the technical challenges involved in addressing HLP in Syria may foster more targeted discussions around the issue of reconstruction. It is well known that the projected costs of reconstruction far outstrip Syria's war-ravaged economy<sup>44</sup>, compounded by a drop in the value of the Syrian Pound against the US dollar. While Syria would need the economic support of the international community to rebuild, the EU has declared that it will not consider funding reconstruction until it sees a political transition in line with UN Security Council Resolution 2254 "firmly underway", including "minimal conditions for stability and inclusiveness, a democratic and inclusive government guaranteeing people's safety and security, an agreed conflict-sensitive development strategy, reliable and legitimate interlocutors as well as guarantees in terms of funding accountability."<sup>45</sup> These demands have been rejected by an economically strapped but militarily victorious Syrian government unwilling to make concessions that might weaken its grip on power.

In the face of this zero-sum stalemate, actors such as the International Crisis Group have called for the EU to consider "a phased and incremental approach toward reconstruction based on positive incentives – small-scale rehabilitation projects, a progressive lifting of sanctions, a gradual normalisation of relations and a staggered disbursement of reconstruction funds" in exchange for the government taking steps to implement Resolution 2254 or making progress on key human rights issues including property rights and displacement.<sup>46</sup>

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<sup>39</sup> UN Commission on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons ("Pinheiro Principles"), E/CN.4/Sub.2/2005/17 (28 June 2005).

<sup>40</sup> FAO, OCHA, OHCHR, UN-HABITAT, UNHCR, *Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the "Pinheiro Principles"* (2007).

<sup>41</sup> Committee of Ministers of the Council of Europe, Resolution 1708 (2010) – Solving property issues of refugees and internally displaced persons (2010).

<sup>42</sup> UN Guidance Note of the Secretary-General: The United Nations and Land and Conflict (March 2019).

<sup>43</sup> See, e.g., Scott Leckie and Chris Huggins, *Conflict and Housing, Land and Property Rights: A Handbook on Issues, Frameworks and Solutions*, Cambridge University Press (February 21, 2011).

<sup>44</sup> Joseph Daher, "The Paradox of Syria's Reconstruction" (Carnegie Middle East Center, 04 September 2019).

<sup>45</sup> Council of the European Union, "Brussels III Conference on 'Supporting the future of Syria and the region': co-chairs declaration" (14 March 2019), paragraph 41.

<sup>46</sup> International Crisis Group, "Ways out of Europe's Syria Reconstruction Conundrum", *Middle East Report No. 209* (25 November 2019), iii.



Without addressing the merits of this proposal, it is fair to point out that the more specific Western demands and conditions are in relation to HLP and other core issues, the less likely it is that pretextual reforms or token measures can be used as a means of seeking Western support without making the meaningful concessions needed to reintegrate war-affected populations and secure future stability. In fact, the articulation of concrete expectations around HLP rights could become a platform uniting a broad coalition of actors, including Syrian civil society organisations (CSOs) and affected communities inside and outside of Syria, INGOs, donors and UN agencies. This combination of specificity and a united front could substantially increase the limited leverage actors concerned about HLP issues in Syria have now.

## 5. Protecting Home and Property

**One of the most urgent challenges in the Syrian context is the need to ensure that those whose property has not been registered in national registers – and may not be eligible for formal registration – are not excluded from HLP responses. Without such measures, there will be no protection for thousands of Syrians already displaced from informal settlements and thousands more still living in such settlements under the threat of eviction. Since the adoption of Law 10 in 2018, nearly half the urban population of Syria have lived under an overhanging threat of permanently losing their homes and assets.**

Many past responses to conflict HLP issues have also had to address the gap between property rights that are recognized under national law and those that are not. The need to protect the rights of those that do not enjoy formal rights to the homes they and their families depend on is the reason that international standards such as the UN Restitution Principles have coined the terminology of “housing, land and property” (HLP) rights. This terminology also reflects the fact that HLP violations interfere with the enjoyment of two closely-related categories of rights – rights to property and rights to the home.

The right to enjoyment of property is usually phrased in both national law (including the Syrian Constitution) and international human rights law as freedom from arbitrary expropriation of property.<sup>47</sup> The state has a right to interfere with property rights in order to acquire land needed, e.g. for development purposes, but the right to property requires that expropriations be undertaken only as necessary for such public purposes, and then in accordance with procedures set out in law, including payment of fair compensation. These conditions apply to the taking of any property held by individuals based on recognized ownership rights, regardless of how they use the property. In other words, there is no requirement that the property be used to meet the owner’s personal residential or livelihood needs for legal protections to apply.

The right to the home is an equal and opposite protection, in the sense that it protects individuals and families from arbitrary eviction from any property that they depend on for their residential needs or economic livelihoods, regardless of whether they have recognized legal rights to it. This right derives from several human rights, including the civil and political right of families to

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<sup>47</sup> Universal Declaration of Human Rights, Article 17; European Convention on Human Rights, Article 1 of Protocol One; African Convention on Human Rights and People’s Rights, Article 14; and American Convention on Human Rights, Article 21.

privacy in their home and the economic and social right to adequate housing.<sup>48</sup> The latter right states that one of the conditions for housing to be recognized as “adequate” is that there be legal security of tenure, meaning protection from arbitrary evictions.<sup>49</sup>

This does not guarantee an absolute right not to be evicted (just as the right to property does not involve an absolute right not to be expropriated). However, it does require legal protection and due process for families facing eviction. The level of protection can vary in relation to the type of tenure residents have in their homes. Those with legally recognized rights such as tenants with rental contracts receive stronger safeguards, but even squatters must be accorded some degree of protection as long as the property in question is their home.

The jurisprudence of the European Court of Human Rights provides some useful examples of the close links between rights to property and the home. The Court’s decisions indicate that restitution claims by displaced persons are strongest in cases in which both rights apply, e.g. the claimants both formally owned the claimed properties and used them as their home. However, the Court has also been willing in some cases to recognize the existence of property rights that are not clearly recognized in domestic law, defining them as “possessions” protected under the right to property in Article 1 of the first Protocol to the ECHR.<sup>50</sup> For instance, in a case relevant to Syria, the Court found that longstanding official toleration of an illegal construction in an urban informal settlement in Turkey gave rise to a property interest:

*... the fact that the applicant had occupied land belonging to the Treasury for approximately five years could not confer on him a right that could be regarded as a “possession”. However ... the applicant had been the owner of the structure and fixtures and fittings of the dwelling he had built and of all the household and personal effects which might have been in it, notwithstanding the fact that the building had been erected in breach of the law. The Chamber accordingly concluded that the dwelling built by the applicant and his residence there with his close relatives represented a substantial economic interest and that that interest, which the authorities had allowed to subsist over a long period of*

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<sup>48</sup> Universal Declaration on Human Rights, Articles 12 and 25; International Covenant on Economic, Social and Cultural Rights, Article 11; European Social Charter, Article 16; European Convention on Human Rights, Article 8.

<sup>49</sup> UN Commission on Economic Social and Cultural Rights, General comment No. 7: The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions (1997).

<sup>50</sup> European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of Property* (updated 31 August 2019), 7-9.

*time, amounted to a “possession” within the meaning of the rule laid down in the first sentence of Article 1 of Protocol No. 1.<sup>51</sup>*

The Court came to a similar conclusion in relation to unregistered rural land claimed by internally displaced persons after conflict in southeastern Turkey. In this case, the property claimed was crucial to both the residential and livelihood needs of the claimants:

*...it is undisputed that the applicants all lived in Boydas village until 1994. Although they did not have registered property, they either had their own houses constructed on the lands of their ascendants or lived in the houses owned by their fathers and cultivated the land belonging to the latter. The Court further notes that the applicants had unchallenged rights over the common lands in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling. Accordingly, in the Court’s opinion, all these economic resources and the revenue that the applicants derived from them may qualify as “possessions” for the purposes of Article 1.<sup>52</sup>*

The case of property restitution in Bosnia and Herzegovina provides several indicative examples of how unrecognized property rights can be given effect in restitution processes. First, the restitution process in Bosnia applied not only to private property but also socially-owned apartments, which were the predominant form of urban housing throughout the former Yugoslavia. These apartments were owned by socially-owned enterprises and other public bodies, but their occupants were accorded significant security of tenure. By the early 1990s, when the Bosnian conflict erupted, a process of privatization had begun throughout the former Yugoslavia, by means of which socially owned apartments would be available for purchase on preferential terms to their current residents. As a result, the Bosnian restitution laws treated occupancy rights to such apartments as nascent property rights, requiring them to be restituted to displaced prewar occupants in a similar manner to private property.<sup>53</sup> This approach was subsequently confirmed by the European Court of Human Rights in a case involving apartments built by the Yugoslav army:

*[In Bosnia,] the national authorities have consistently held that a contract to purchase a military or any other socially owned flat,*

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<sup>51</sup> European Court of Human Rights, Judgment, Case of Öneriyıldız v. Turkey, Application no. 48939/99 (30 November 2004), paragraph 121.

<sup>52</sup> European Court of Human Rights, Judgment, Doğan and Others v. Turkey, Applications nos. 8803-8811/02, 8813/02 and 8815-8819/02 (29 June 2004), paragraph 139.

<sup>53</sup> “Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice,” *New York University Journal of International Law and Politics* 37/3 (Mar. 2006), 478.

*although it does not of itself transfer title to the buyer, confers on the buyer the right to occupy the flat and to be registered as owner and that it therefore constitutes “possessions” for the purposes of Article 1 of Protocol No. 1 ...<sup>54</sup>*

The Bosnian restitution process also extended to unregistered private property. As in Syria, the Bosnian authorities had failed to provide sufficient urban low-income housing, resulting in large informal settlements consisting of unregistered, privately built homes.<sup>55</sup> Both in such informal settlements and in the countryside, there was also a general reluctance to register property in the cadastral records in order to avoid tax payments. The restitution process reflected these practices by allowing restitution of private property not only to registered owners but also lawful possessors:

*The owner of the real property declared abandoned shall have the right to file a claim for the return of the real property at any time. Exceptionally, claims for repossession of real property may also be made by persons who were in unconditional possession of the real property at the time it was declared abandoned.<sup>56</sup>*

The point in a context like Syria is that property rights should be defined in a way that does not artificially exclude possessions that have been treated as property both by occupants and their communities, as well as by the authorities, if only in the form of toleration. Moreover, even forms of tenure that are not recognized as property interests should nevertheless be protected when they involve homes that claimants depended on for their residential and livelihood needs, as reflected in the UN Restitution Principles:

*States should ensure that the rights of tenants, social-occupancy rights holders and other legitimate occupants or users of housing, land and property are recognized within restitution programmes. To the maximum extent possible, States should ensure that such persons are able to return to and repossess and use their housing, land and property in a similar manner to those possessing formal ownership rights.<sup>57</sup>*

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<sup>54</sup> European Court of Human Rights, Judgment, *Đokić v. Bosnia and Herzegovina*, Application no.6518/04 (27 May 2010), paragraph 50.

<sup>55</sup> Rhodri Williams, “Post-Conflict Land Tenure Issues in Bosnia: Privatization and the Politics of Reintegrating the Displaced,” in J. Unruh and R. Williams (eds.), *Strengthening Post-Conflict Peacebuilding through Natural Resource Management, Volume III – Land and Post-Conflict Peacebuilding* (Routledge, 29 April 2013).

<sup>56</sup> Federation of Bosnia and Herzegovina, Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property, Official Gazette of the Federation of Bosnia and Herzegovina, No. 11/98, Article 4.

<sup>57</sup> UN Commission on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”), E/CN.4/Sub.2/2005/17 (28 June 2005), Principle 16.

To be effective, legal remedies for ongoing and future HLP violations in Syria must recognize and protect property interests that ordinary people depend on to be able to reintegrate into post-conflict societies with safety, dignity and economic autonomy. In light of the fact that the HLP protections set out in the Syrian Constitution and laws have never been given meaningful effect, it would be fundamentally unfair to apply a narrow interpretation of those domestic legal norms to deny victims of HLP violations a remedy.

## 6. Developing a procedural remedy for HLP violations

**Recognition of rights to property and the home requires that legal remedies be provided in cases where they have been violated. Legal remedies are understood to involve both procedural and substantive elements. The procedural elements of legal remedies are best understood as set out in founding human rights texts like the International Covenant on Civil and Political Rights, when an individual accuses a state of human rights violations, this claim must be given a fair hearing:**

*Each State Party to the present Covenant undertakes:*

*(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*

*(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;<sup>58</sup>*

*(c) To ensure that the competent authorities shall enforce such remedies when granted.*

The “Van Boven-Bassiouni Principles” on legal remedies for the most serious violations of human rights and humanitarian law go further in detailing how procedural remedies could be adapted to mass violations such as those in Syria.<sup>59</sup> The recommendations include a number of particular measures including dissemination of full information on remedies, provision of assistance to victims and steps to “minimize the inconvenience to victims and their representatives” as well as to protect them from interference with their privacy and retaliation.<sup>60</sup> The principle that victims of mass crimes should be eligible for facilitated remedial processes has been further elaborated in practice in restitution processes such as Bosnia, as well as in transitional justice reparations processes.<sup>61</sup> They are also endorsed throughout the UN Restitution

<sup>58</sup> International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, Article 3.

<sup>59</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (“Van Boven-Bassiouni Principles”), UN General Assembly resolution 60/147 (16 December 2005), Section VIII.

<sup>60</sup> *Id.*, paragraph 12(b).

<sup>61</sup> UN General Assembly, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/69/518 (14 October 2014).

Principles, which call for rapid, effective, accessible, fair and non-discriminatory procedures.<sup>62</sup>

In mass displacement settings, flexible administrative procedures are demonstrably more effective than rigid judicial approaches. Such “facilitated procedures” recognize the limited ability of victims to produce documentation or pay for legal representation. These types of responses to mass dispossession are described in a 2008 Manual on responding to internal displacement produced by the Brookings Institution-University of Bern:

*Facilitated procedures provide faster (and therefore more effective) remedies because, unlike judicial procedures, they do not require specific proof of all the relevant facts in each case. Part of the reason that ad hoc procedures can be set up at all is that they are designed to process a caseload of claims about which certain factual generalizations can accurately be made. In the context of property-related claims in displacement settings, it generally can be assumed that persons who left areas in the context of mass displacement events did so involuntarily and should be entitled to return and exercise their property rights.*<sup>63</sup>

These approaches have also been endorsed by the European Court of Human Rights, in recent cases involving HLP violations in the frozen conflict between Armenia and Azerbaijan. The Court reviewed its case-law from other conflict cases and noted that it had developed “a flexible approach regarding the evidence to be provided by applicants who claim to have lost their property and home in situations of international or internal armed conflict”, in line with the UN Restitution Principles.<sup>64</sup> The Court went on to recognize ownership rights based on unofficial evidence such as technical documents short of title deeds, personal documentation establishing residence in the area, and written testimony of family members and former neighbours.<sup>65</sup> In justifying these measures, the Court notes that it is “hardly astonishing” that claimants forced to flee their homes during armed attacks do not have the presence of mind to retrieve their title documents and bring them along.<sup>66</sup> In respect of these property rights, the Court went on to order, in effect, facilitated procedural remedies:

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<sup>62</sup> UN Commission on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”), E/CN.4/Sub.2/2005/17 (28 June 2005), Principles 12-15.

<sup>63</sup> The Brookings Institution-University of Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: A Manual for Law and Policymakers* (October 2008).

<sup>64</sup> European Court of Human Rights, Judgment, Case of Sargsyan v. Azerbaijan, Application no. 40167/06 (16 June 2015), Paragraph 184.

<sup>65</sup> Id., paragraphs 192 - 193.

<sup>66</sup> Id., paragraph 194.



*At the present stage, and pending a comprehensive peace agreement, it would appear particularly important to establish a property claims mechanism, which should be easily accessible and provide procedures operating with flexible evidentiary standards, allowing the applicant and others in his situation to have their property rights restored and to obtain compensation for the loss of their enjoyment.<sup>67</sup>*

In the context of Syria, the well-documented lack of independence of the courts renders them presumptively unfit to administer an effective remedial response to HLP violations.<sup>68</sup> However, there are good grounds to doubt whether the Syrian Government has either the political incentives or the sheer capacity to set up an effective nationwide program of facilitated remedies based on administrative law principles. Under the circumstances, it may prove necessary to consider the role that local community leadership may ultimately play in facilitating return and adjudicating HLP claims. Such leadership may range from village headmen (mukhtars) applying customary rules to religious authority figures or businessmen. Indeed, it is worth noting here that local businessmen have emerged as part of a broader class of “intermediaries” with a demonstrated ability to negotiate with state security and administrative actors to facilitate the return of IDPs.<sup>69</sup> There are many risks to such an approach, including the lack of consistent rules and procedures and the likelihood of arbitrariness, corruption and favoritism. However, on current trends it may present the only meaningful way forward, raising the question of how the capacity of local intermediaries could be built to try to ensure as equitable and effective a process as possible.

Although it may be too early to state exactly what types of procedural remedies would be most appropriate and feasible in Syria, it is possible to predict where the greatest challenges may lie and consider procedural responses. For instance, the issue of documentation of property rights will be particularly crucial in Syria, where many victims of HLP violations had not formally registered their property, and even those that have may lack documentation to prove it. Humanitarian actors such as the Norwegian Refugee Council have documented low levels of civil and HLP documentation among displaced persons; one survey of Syrian refugees found that 70% did not even have their national identity card.<sup>70</sup> Their findings on lack of HLP documents were no less concerning:

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<sup>67</sup> Id., paragraph 238.

<sup>68</sup> Mikael Ekman (ed.), *ILAC Rule of Law Assessment Report: Syria 2017* (2017).

<sup>69</sup> Center for Operational Analysis and Research, *Thematic Report: Intermediaries of Return* (07 October 2019).

<sup>70</sup> Norwegian Refugee Council, “Syrian Refugees’ Right to Legal Identity: Implications for Return” (January 2017).

*... nearly a third of the refugees who reported having documents for their most important property in Syria reported that those documents were lost or destroyed, and at least half who left their documents said that they are at risk of not finding their documents if and when they return.*<sup>71</sup>

International standards and practice set out numerous technical approaches to resolving documentation and evidence issues. For instance, the German restitution program set up in the 1990s to address East German nationalization of property and Nazi confiscations was defined as an administrative law process in order to avoid the more stringent evidentiary requirements set out in the Civil Code.<sup>72</sup> German Administrative Law, by contrast, applies a relatively low burden of proof and places a duty on administrative adjudicators to identify all relevant evidence for restitution claims on their own (albeit with all assistance the applicants can furnish).

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<sup>71</sup> Norwegian Refugee Council, “Reflections on future challenges to Housing, Land and Property restitution for Syrian refugees” (January 2017).

<sup>72</sup> Gestezzur Regelung offener Vermögensfragen (Law Regulating Unsettled Property Questions [Vermögensgesetz z. - VermG] of September 23, 1990 (published in BGBI. II S. 885, 1159).

## 7. Substantive remedies: restitution and compensation

**Where procedural remedies are in place, the focus quickly shifts to “substantive remedies”, or the measures taken to actually address violations. The two most common substantive remedies for HLP violations are restitution (the physical return of the same properties that were wrongfully taken) and compensation (provision of equivalent alternative properties or their value in money). Although there is a traditional preference for restitution over compensation whenever the former is possible, debates remain about the precise relationship between these two remedies.**

The UN Restitution Principles have taken a very strong approach in favor of restitution, with compensation only permitted as an alternative where freely chosen by claimants, stipulated in a peace agreement, or where restitution is “factually impossible”, meaning that the property “is destroyed or no longer exists, as determined by an independent, impartial tribunal.”<sup>73</sup> The European Court of Human Rights, by contrast, has ruled out property remedies consisting of only compensation, but also declined to apply the “factual impossibility” standard from the UN Restitution Principles in cases related to the Cyprus conflict.<sup>74</sup>

Two questions typically frame this debate. The first involves the preferences of victims of HLP violations; if they wish to return to their homes, restitution is a precondition for them to be able to do so. The second question involves the rights of “secondary occupants” that may simply be squatting in claimed properties or may have been granted temporary or even permanent rights to remain there. Where properties have been destroyed, restitution is not an immediately feasible option and compensation is a more straightforward choice. But where properties are occupied, restitution is possible, but can only be enforced by evicting secondary occupants.

In cases of longer-term displacement, secondary occupants can be seen as developing competing claims to contested properties under international human rights law. This is particularly clear where the subsequent occupants bought the property from earlier occupants without having reason to know that there might be claims on it. However, in a case such as Syria, where HLP

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<sup>73</sup> UN Commission on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons (“Pinheiro Principles”), E/CN.4/Sub.2/2005/17 (28 June 2005), Principle 21.

<sup>74</sup> Rhodri Williams and Ayla Gürel, “The European Court of Human Rights and the Cyprus Property Issue: Charting a Way Forward,” *PRIO Cyprus Centre Paper 1/2011* (October 2011).

violations are recent and ongoing amid heavy international scrutiny and criticism, it is difficult to argue that occupants could have legitimately acquired possession of abandoned properties without having had any reason to be aware that earlier owners had been wrongfully dispossessed. As a result, some postwar restitution programs such as that in Bosnia have simply reversed wartime procedures for allocating abandoned property to secondary occupants, setting out a presumption that such occupants do not have legitimate rights and must vacate it in favor of the pre-war owners.<sup>75</sup>

In the German restitution process, the law relied on the well-established facts related to the persecution of the Jews to support a legal presumption that confiscations of Jewish property before and during World War II were unlawful.<sup>76</sup> A related rule found that no one who purchased confiscated property through the end of World War II could assert the legal validity of their purchase based on a claim to have done so in good faith (e.g. without having had reason to know of the previous unlawful confiscation of the property).<sup>77</sup> This is also the default approach set out in the UN Restitution Principles:

*States should ensure that the safeguards of due process extended to secondary occupants do not prejudice the rights of legitimate owners, tenants and other rights holders to repossess the housing, land and property in question in a just and timely manner.*<sup>78</sup>

While international law and practice argue in favor of restitution in Syria, the most important factor in determining the remedy displaced persons and refugees receive should be their own informed decisions of what would be most desirable. Security is likely to be a paramount consideration in Syria and one that will affect decisions on return and preferred remedies.<sup>79</sup> For some, return may be seen as too risky, with compensation as a preferred option. Other communities might see the safest option as returning together and seeking joint restitution of all their properties. Any eventual peace agreement or new constitutional framework is likely to set the parameters for HLP remedies in Syria, and it is crucial that displaced communities and other victims of HLP

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<sup>75</sup> Rhodri Williams, "Post-Conflict Property Restitution and Refugee Return in Bosnia and Herzegovina: Implications for International Standard-Setting and Practice," *New York University Journal of International Law and Politics* 37/3 (March 2006).

<sup>76</sup> Gesetz zur Regelung offener Vermögensfragen (Law Regulating Unsettled Property Questions [Vermögensgesetz z. - VermG] of September 23, 1990 (published in BGBl. II S. 885, 1159), Article 1, paragraph 6.

<sup>77</sup> *Id.*, Article 4, paragraph 2. This rule was upheld by the German Constitutional Court in its November 23, 1999 decision 1 BvF 1/94.

<sup>78</sup> UN Commission on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons ("Pinheiro Principles"), E/CN.4/Sub.2/2005/17 (28 June 2005), Principle 17.2.

<sup>79</sup> *Syrians in Displacement, Forced Migration Review* 57 (February 2018).

violations are consulted and enabled to meaningfully participate throughout the process of designing remedies and putting them into practice.<sup>80</sup>

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<sup>80</sup> UN Commission on Human Rights, Principles on Housing and Property Restitution for Refugees and Displaced Persons ("Pinheiro Principles"), E/CN.4/Sub.2/2005/17 (28 June 2005), Principle 14.

## 8. Addressing the gender dimension of HLP rights

**One of the most significant challenges to the design of HLP remedies is the fact that even if it were possible, simply restoring the pattern of property ownership that existed before a conflict might itself be unjust. In pre-conflict Syria, legal provisions and social customs dictated that women were expected to cede control of property and other economic assets to male relatives in exchange for the assurance that their male relatives would, in turn, provide for them.<sup>81</sup> While HLP rights were highly contested in many other ways in pre-conflict Syria, the contrast between men's access to property and women's lack of property rights presents not only an injustice in itself but one that will have drastic repercussions for women affected by the conflict that enveloped the country.**

Cultural practices presupposing starkly different roles for men and women are a common feature in many other countries in the region. Their persistence has triggered a long-running debate, with detractors pointing out that unjustified differential treatment of women constitutes unlawful discrimination, and defenders claiming that “the whole scheme is supportive of the family and fosters its interdependence.”<sup>82</sup> In its 2005 Arab Human Development Report, the UNDP pointed out the economic opportunity cost of low female participation in the economic life of Arab countries, noting that it resulted in the highest dependency ratio in the world, “with each worker supporting more than two non-working people, compared to less than one in East Asia and the Pacific.”<sup>83</sup> The UNDP concluded that:

*The failure to use human capital, especially highly educated women, curbs economic development and squanders important energies and investments, which might otherwise contribute to greater economic development for all.<sup>84</sup>*

Since 1973, the Syrian Constitution has guaranteed equality before the law and equality of opportunity to all its citizens.<sup>85</sup> However, the legal framework has remained inadequate in many respects, ranging from the failure to legally prohibit gender-based discrimination to restricting on women's right to work and personal status. The effect of discriminatory legal provisions is magnified

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<sup>81</sup> European Union, *An Update of the Gender Profile for Syria* (2019), 57.

<sup>82</sup> Siraj Sajt and Hilary Lim, *Land, Law and Islam* (UN Habitat, 2006), 135.

<sup>83</sup> UNDP, Arab Human Development Report 2005: Towards the Rise of Women in the Arab World (2005), 8.

<sup>84</sup> *Id.*, 9.

<sup>85</sup> European Union, *An Update of the Gender Profile for Syria* (2019), 38.

by the persistence of patriarchal and structural practices that work to inhibit women's equal access to property and other economic assets. An example is the right of natal inheritance (from deceased parents). In Syria, as in many other countries in the region, girls are typically expected to voluntarily give up their shares of inheritance based on the premise that their brothers will provide for them as necessary in the future.<sup>86</sup> In the course of discussions with Syrian partners, it was highlighted that pressure on women to renounce their share of inheritance remains universal, affecting educated middle class women no less than women in rural or more traditional communities.

Since the eruption of the conflict in Syria, social customs limiting women's equal access to economic resources and giving men the primary role for providing for their families have been placed under enormous strains. On one hand, tens of thousands of men have been killed in combat operations, detained or disappeared. This has left an increasing number of women in new heads of their households,<sup>87</sup> Most surviving, non-displaced young men have little alternative but to participate in the conflict as combatants, in light of the prevalence of forced conscription by the Syrian army and other armed groups.<sup>88</sup> These trends taken together have meant that men are increasingly absent from the family and the workplace in Syria, where women new role. □ This may in turn entail new opportunities for women, but it may also mean that women find themselves in a situation without the necessary tools or equal access to jobs to take on new roles.

Conflict-affected women and their families have been placed in a challenging situation. Discriminatory norms make it more difficult for women to remain in their homes, or to reclaim them if they have been displaced. For women in this situation supporting families, the exercise of HLP rights can be a question of life or death. In an interview with the Norwegian Refugee Council, several specific risks were highlighted, including the effective exclusion of women from natal inheritance, the tendency to assume that all marital property was the sole property of husbands, the failure of women to register their property assets, and the fact that women whose marriage ends due to divorce or widowhood frequently lose their marital homes as a result.<sup>89</sup> However, the NRC had also seen a promising increase in Syrian women actively seeking to exercise their HLP rights and rejecting social customs.

Given the new roles and responsibility the conflict has thrust upon women against a background of legal discrimination and repressive customs, it is crucial that remedies for HLP violations are crafted and implemented in close

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<sup>86</sup> Id., 41.

<sup>87</sup> Id., 67.

<sup>88</sup> Id., 70.

<sup>89</sup> Interview, Norwegian Refugee Council (21 November 2019).

consultation with Syrian women. Customary views on gender relations are deep rooted and have in many cases been reinforced by the conflict. While it is crucial that they be countered in the context of any meaningful response to HLP violations, Syrian women are in the best position to assess the risks and opportunities presented by specific modalities of doing so.



## 9. Conclusions and Recommendations

**Violations of human rights law and humanitarian law continue to be committed in Syria on an unprecedented scale, shaking the credibility of the international architecture for peace, security and human rights set up after World War II. Despite groundbreaking efforts to prosecute crimes in Syria using universal jurisdiction, most perpetrators are unlikely to ever be held accountable, and universal jurisdiction can never do justice to the violations that have taken place in Syria, or any country, over the course of nine years. Meanwhile, focusing solely on prosecution does little to provide redress to victims or respond to the needs of vulnerable displaced populations. Thinking about accountability more broadly in terms of what is due to rights holders provides a useful reminder that remedies for victims of crimes, such as housing, land and property (HLP) violations are no less important than prosecution of those responsible.**

With half the population of Syria displaced from their homes and facing the loss of their HLP rights, the property issue is not only a key human rights concern but also a central element in achieving a fair and sustainable peace agreement that allows the reintegration of conflict-affected populations. The challenges are huge. Throughout Syria's history, property rights have been protected in name only, and urbanization has been accompanied by the expansion of informal settlements that house nearly half the population of Syria's cities. This has set the stage for the adoption of wartime laws and decrees that ostensibly support the reconstruction of Syria but actually threaten the poor and displaced with dispossession, while transferring control of property and natural resources to the governing elite and its foreign allies.

Historical patterns of gender discrimination in access to property and economic assets have also contributed to the vulnerability of poor and displaced women. Many women have lost husbands and male relatives in the conflict and had the responsibility of providing for their families thrust upon them. Without the ability to claim legal rights to properties their families depend on, these women and their entire households will find themselves in existential peril. Taking steps to ensure that women enjoy equal rights to property is a precondition for ensuring the effectiveness of any future HLP remedies. Over the longer term, it may also be indispensable to the sustainable social and economic reconstruction of the country.

Addressing the HLP issue in Syria is necessary to achieve sustainable peace but will be technically complicated. The problems that result from the conflict are exacerbated by prior decades of corruption, discrimination, lack of investment and management, and unaddressed legal pluralism. However, decades of international human rights and humanitarian practice in conflict-affected countries has resulted in a rich compendium of international

standards and practice on property restitution. Technical solutions exist for the technical challenges seen in Syria.

Seen in this light, the obstacles to resolving HLP issues in Syria are fundamentally political, with vested interests unlikely to voluntarily relinquish control over property and natural resources they have acquired during the conflict. However, it is crucial to recognize that insecure property rights affect virtually the entire Syrian population, not just the displaced. As other sources of rent generation have dried up and the government and its allies have grown more predatory, the property rights of virtually all Syrians have come under threat. The concerns of Syrians across the political spectrum and international actors concerned about the Syrian conflict could be united in a broad coalition in favor of anchoring fair and secure property rights in any future settlement of the conflict, for the good of all Syrians and the sustainable development of the country.

**Accordingly, efforts to provide a remedy for HLP violations in Syria may consider the following recommendations:**

- Recognize that conflict HLP violations did not take place in a vacuum, but rather built on and exacerbated longstanding socio-economic inequities, rights violations and administrative dysfunctions in Syria;
- Ensure the participation of women, in particular, in crafting HLP remedies that can mitigate the risks posed by current HLP violations in light of the long history of discrimination against women and denial of control over economic assets;
- Frame a response to HLP issues based on a broad understanding of the concept of accountability; the Syrian state as duty bearer remains obligated to address past human rights violations (including HLP violations) and take steps to prevent their recurrence in the future;
- Maintain an updated analysis of how the HLP issue affects various categories of Syrians, both inside and outside Syria, and work to build the broadest possible coalition of Syrians, along with concerned regional and international actors, in favor of reform and restitution proposals;
- Rely on international standards and comparative practice in seeking technically feasible solutions to the types of HLP violations observed in Syria, and specifically;
  - Design legal remedies to extend to the loss of all property interests ordinary people depended on to meet their residential and livelihood needs, and not only property registered in formal ownership under Syrian domestic law;
  - Ensure that the procedures for seeking legal remedies do not impose unnecessary burdens

- on applicants, delivering rapid and facilitated processing of claims;
  - Include relaxed evidentiary requirements in light of the general lack of documentation available to Syrian property rights holders, as well as the well-known nature of both pre-conflict and conflict-related failures to protect property rights;
  - Consult with victims of property violations in order to design remedies that reflect their preferences; for those interested in returning to their homes, restitution of property will be necessary, while for those interested in remaining elsewhere compensation in cash or equivalent properties is more appropriate; and
- As an overall goal, seek to protect property interests that ordinary people – women and men, displaced or non-displaced – depend on to be able to reintegrate into a post-conflict society with safety, dignity and economic autonomy.

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**ILAC is a global rule of law consortium providing technical assistance to justice sector actors in fragile and conflict-affected countries.**

ILAC's mission is to rapidly respond to and assess the needs of the justice sector in conflict-affected and fragile countries, and help strengthen the independence and resilience of justice sector institutions and the legal profession.

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